Supreme Court, U. S.
FILED
SEP5 1980
MICHAEL RODAK, JR., CLERK

No. 80-356

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD M. FOGARTY
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4800

Attorney for Petitioners

Of Counsel:

WILKINSON, CRAGUN & BARKER
THOMAS E. WILSON

September 5, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether—contrary to the prior decisions of at least four courts of appeals—the Federal Reserve Board may approve a bank holding company application for permission to engage in nonbanking activities, pursuant to Section 4(c)(8) of the Bank Holding Company Act, in the absence of any showing that such approval would result in any "public benefits."

2. Whether—contrary to the express language of Section 9 of the Bank Holding Company Act—the Federal Reserve Board's approval of such an application may be affirmed if not supported by "substantial evidence."

PARTIES TO THE PROCEEDING BELOW

Petitioners before the court of appeals (and before this Court) were (and are) the Independent Insurance Agents of America, Inc. ("IIAA") and three of its constituent state associations of independent insurance agents.*

Respondent below (and before this Court) was (and is) the Board of Governors of the Federal Reserve System ("Board").**

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* Petitioner IIAA participated in each of the three cases consolidated before the court of appeals. The Independent Insurance Agents of New Jersey was a petitioner in No. 79-1280 below; the Independent Insurance Agents of New Mexico was a petitioner in No. 79-1398 below; and the Pennsylvania Association of Independent Insurance Agents was a petitioner in No. 79-1471 below.

** The respondent Board was respondent in each of the three consolidated cases. Only one of the bank holding companies whose applications were in issue elected to intervene before the court of appeals: First National State Bancorporation, Inc. (of New Jersey) participated as an intervenor in No. 79-1280 below.

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DECISIONS BELOW

On February 14, 1979, the Federal Reserve Bank of New York, acting pursuant to authority delegated by the respondent Board, approved the application of First National State Bancorporation, Inc. to engage in the sale of property and casualty insurance in the State of New Jersey. That decision is reproduced as Appendix A to this petition. *See* App. at 1a.

On March 13, 1979, the Federal Reserve Bank of Kansas City approved the application of New Mexico Bancorporation, Inc. to engage in the sale of property and casualty insurance in the State of New Mexico. That

decision is reproduced as Appendix B to this petition. *See* App. at 4a. On March 30, 1979, the respondent Board denied petitioners' petition for review of that decision. The Board's ruling is reproduced as Appendix C hereto. *See* App. at 7a.

On April 6, 1979, the Federal Reserve Bank of Cleveland approved the application of Pittsburgh National Corporation to engage in the sale of property and casualty insurance in Pennsylvania. That decision is reproduced as Appendix D to this petition. *See* App. at 11a. On April 24, 1979, the respondent Board denied petitioners' petition for review of that decision. *See* App. at 14a.

On April 21, 1980, a panel of the United States Court of Appeals for the District of Columbia Circuit entered judgment affirming the respondent Board's approval of each of those applications, without opinion. The judgment of the court of appeals, of which review is now sought, has not been reported; it is reproduced as Appendix F to this petition. *See* App. at 16a.

JURISDICTION

As indicated, the judgment of the court of appeals was entered on April 21, 1980. Petitioners' timely petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals on June 10, 1980. Those orders are reproduced as Appendix G and Appendix H to this petition. *See* App. at 18a, 20a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTE INVOLVED

The statutory provisions involved in this proceeding are Section 4(c)(8) and Section 9 of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1843(c)(8), 1848 (1976) ("BHC Act"). Those sections of the Bank Holding Company Act are reproduced as Appendix I to this petition. *See* App. at 22a.

STATEMENT OF THE CASE

Petitioners sought review in the court of appeals of three orders of the Federal Reserve Board, each of which had approved the application of a bank holding company for permission to engage in the sale of property and casualty insurance, in competition with petitioners' member independent insurance agents.

In each case, the Federal Reserve Board had approved the subject application (i) on the basis of an erroneous legal standard and (ii) without *any* (much less, "substantial") evidence to support the statutorily mandated conclusion that approval of the subject application could "reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects." *See* 12 U.S.C. § 1843(c)(8) (1976).

On April 21, 1980, a panel of the court of appeals entered judgment, pursuant to Rule 13(c) of its Rules, affirming the Board's approval of each application, without opinion. The panel's unexplained countenance of the Board's admitted application of an erroneous legal standard and its failure to require the Board to carry out the adjudicative function mandated by Section 4(c)(8) of the BHC Act represents a radical departure from prior law as repeatedly articulated by several courts of appeals.

The ruling of the court of appeals contravenes the clear mandate of Section 4(c)(8) itself, the section's legislative history, and the prior decisions of at least four courts of appeals.[1] Moreover, the failure of the panel to review the Board's factual conclusions in accordance with the "substantial evidence" standard is dramatically at odds not only with well-settled judicial precedent, but also with the clear directive of Section 9 of the Bank Holding Company Act, 12 U.S.C. § 1848 (1976).[2]

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[1] *See* notes 7-16 *infra* and accompanying text.

[2] *See* notes 17-20 *infra* and accompanying text.

REASONS FOR GRANTING THE WRIT

The potential ramifications of the court's unexplained affirmance of the subject Board orders are profound.

A cornerstone of this nation's bank regulatory legislation has long been the steadfast maintenance of a careful separation of the business of banking from other forms of commerce. Since the establishment of the national banking system in 1864, Congress has unwaveringly prohibited federal banking associations from engaging in any commercial activity which is not "banking" or "incidental" to the business of banking.[3] That prohibition has been continued and extended to the activities of bank holding companies by the Bank Holding Company Act of 1956 and the 1970 amendments thereto.[4]

Accordingly, the Bank Holding Company Act prohibits bank holding companies from owning the shares of any company which is not a bank,[5] with certain expressly delineated exceptions. Principal among those limited exceptions is that set forth in Section 4(c)(8) of the BHC Act.

Section 4(c)(8) provides that a bank holding company may engage in a nonbanking activity if—*and only if*—it can make an affirmative showing (i) that the activity in which it wishes to engage is "closely related" to banking and (ii) that its participation in that activity can reasonably be expected to result in *benefits to the public*

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[3] *See* National Bank Act, ch. 106, § 8, 13 Stat. 99, 101 (1864). *See also* National Currency Act of 1863, ch. 58, § 11, 12 Stat. 665, 668 (1863); *cf.* New York Banking Act of 1838, *construed in Curtis* v. *Leavitt*, 15 N.Y. 9 (1859).

[4] *See* S. Rep. No. 1084, 91st Cong., 2d Sess. 2-3, *reprinted in* [1970] U.S. Code Cong. & Ad. News 5519, 5520-21; S. Rep. No. 1095, 84th Cong., 1st Sess. 11-14 (1955).

[5] 12 U.S.C. § 1843(a) (1976).

that outweigh possible adverse effects.[6] The Federal Reserve Board's approval of the applications here in issue has, in effect, rewritten Section 4(c)(8), *and deleted the statute's critically important "public benefits" test.* The court's unquestioning conferral of its imprimatur upon that bold initiative will, unless reviewed and corrected by this Court, stand as a clear signal to the Board that it need not scrutinize such applications in the future. Bank holding companies—and the respondent Board—will, in other words, have been released from the constraints which the Congress and the courts have carefully and consistently imposed upon them.

The appellate court's silent acquiescence in the Board's actions will also undermine consistent judicial declarations—and, indeed, the mandate of the Bank Holding Company Act itself—that "public benefits" determinations under Section 4(c)(8) must be reviewed against the well-established "substantial evidence" standard.

I. The Judgment of the Court of Appeals—Which Approved the Application of an Erroneous Legal Standard Under Section 4(c)(8) of the Bank Holding Company Act of 1956, as Amended—Conflicts With Prior Decisions of the United States Courts of Appeals for the Second, Fifth, Eighth and District of Columbia Circuits.

The legal standard employed by the Federal Reserve Board in its approval of these applications was articulated for the first time in its brief to the court of appeals:

> *If there are no adverse effects* in a proposal, *approval of the application is warranted* by the terms of section 4(c)(8), *whether or not public benefits may be expected* from the proposal.[7]

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[6] *Id.* § 1843(c)(8).

[7] Brief for the Respondent, at 42 n.61 (emphasis added). *See also* Transcript of Oral Argument (April 1, 1980), at 18 (Remarks of Board counsel). Because the records in these cases contain *no*

That statement is simply—and clearly—erroneous. The language of Section 4(c)(8) of the BHC Act is blessed with exquisite clarity: The section expressly and unequivocally requires that the Board may approve an application *only* if it determines that approval "can reasonably be expected to produce benefits to the public . . . that *outweigh* possible adverse effects." [8]

Even if that language were ambiguous—which it is not—the legislative history of Section 4(c)(8) leaves absolutely no doubt as to the intent of the Congress. The Conference Report issued in conjunction with the 1970 amendments to the BHC Act states unequivocally that:

> In connection with the overall application of the public benefits test, *it is important to emphasize that the bank holding company making application under Section 4(c)(8) must bear the burden of proof in showing that its carrying on of a particular nonbank activity would produce benefits to the public that outweigh any adverse effects.* This was made very clear in the Senate report which stated:
>
> > He [the Assistant Attorney General, Antitrust Division] concluded that such a provision would "* * * permit banks to demonstrate now or in the future that their entry into these activities in a given manner would be in the public interest." Later he stated that the *approval of a particular application would be* "* * *

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evidence that *any* public benefits would result from the Board's approval of these applications, there can be no question but that this was, indeed, the legal standard applied by the Board.

It should also be emphasized that the applications approved in these cases were so devoid of specific information—and the applicants were so recalcitrant in coming forth to provide details of their proposals—that, in any event, the Board could not reasonably conclude even that "there [were] no adverse effects" which might obtain by virtue of its approval of those applications. *See* notes 17-20 *infra* and accompanying text.

[8] 12 U.S.C. § 1843(c)(8) (1976) (emphasis added).

> *dependent upon an affirmative finding of public benefit by the regulatory authority*, which suggests that bank holding companies seeking to engage in given activities bear the burden of demonstrating positive benefits therefrom." [9]

Until April 21, 1980, *every* court to address the issue had adhered to that clear congressional mandate.

In 1974, the Court of Appeals for the Eighth Circuit expressly confirmed that public benefits must "*override* any possible adverse effects." [10] In 1975, the Court of Appeals for the District of Columbia Circuit adopted precisely the same standard; [11] it emphasized again that: "The individual applicant must still *affirmatively show* . . . that its proposal meets the 'public benefits' test of Section 4(c)(8)." [12] In 1976, the Court of Appeals for the Fifth Circuit emphasized that it "would be error" for the Board to shift the burden of proof under Section 4(c)(8) to protestants by creating a presumption that

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[9] H.R. Rep. No. 1747, 91st Cong., 2d Sess. 19 (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News 5561, 5570 (emphasis added).

[10] *American Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, 509 F.2d 29, 39 (8th Cir. 1974) (emphasis added).

[11] *Independent Bankers Ass'n of Georgia* v. *Board of Governors of the Federal Reserve System*, 170 U.S. App. D.C. 278, 289, 516 F.2d 1206, 1216 (1975), *quoting American Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, *supra* note 10, 509 F.2d at 39; 170 U.S. App. D.C. at 288, 516 F.2d at 1215-16, *quoting* H.R. Rep. No. 1747, *supra* note 9, [1970] U.S. Code Cong. & Ad. News, at 5572 ("the Board must determine *whether the public benefits outweigh the adverse effects*" (emphasis in the Court's opinion)).

[12] 170 U.S. App. D.C. at 288 n.29, 516 F.2d at 1215 n.29 (emphasis added).

bank holding company insurance applications satisfy the "public benefits" test under that section.[13]

In 1979, the Court of Appeals for the Second Circuit joined this harmonious chorus of appellate courts in holding "that the reasonably expected public benefits of the particular proposal must *outweigh* possible adverse effects" and "that the burden is on the applicant *affirmatively to establish* the net public benefit of its proposal . . . ." [14] And, in its most recent pronouncement on the matter, the Court of Appeals for the Fifth Circuit expressly rejected the standard applied by the Board in the instant cases:

> In view of our decision with regard to the public benefits aspects of the net public benefits analysis, the Board's approval of the applications must be reversed . . . . [E]ven if we were to find that the Board was correct in concluding that the proposed activities would result in no significant adverse effects as defined in the Act, we could not affirm its overall decision.[15]

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[13] *Alabama Ass'n of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224, 235 n.6 (5th Cir. 1976), *on rehearing*, 558 F.2d 729 (1977), *cert. denied*, 435 U.S. 904 (1978).

[14] *Citicorp* v. *Board of Governors of the Federal Reserve System*, 589 F.2d 1182, 1190 (2d Cir. 1979) (emphasis added).

[15] *Florida Ass'n of Insurance Agents, Inc.* v. *Board of Governors of the Federal Reserve System*, 591 F.2d 334, 340 (5th Cir. 1979). The court went on to note that:

> When the public benefits test was added to the bill on the floor of the House in 1969, Mr. Patman stated that "[t]he purpose of this amendment is to require the Federal Reserve Board to carefully scrutinize the activities of each bank holding company and its subsidiaries . . . . [T]he Board must still find, *after a detailed and careful review*, that the benefits to be derived by the public from the holding company or subsidiary engaging in a particular activity *clearly outweigh* the possible

On April 21, 1980, a panel of the Court of Appeals for the District of Columbia Circuit abandoned more than a decade of consistent construction of Section 4(c)(8); indeed, it abandoned the clear language of Section 4(c)(8) itself. Without opinion or explanation, it upheld three Board orders which had approved three bank holding company applications under Section 4(c)(8) on the grounds that no adverse effects were apparent on the face of those bare-bones applications.[16]

Petitioners submit that the appellate court's ruling of April 21, 1980 was wrong; that its failure to explain its ruling was unwarranted; and that a writ of certiorari should issue to review that decision.

II. The Court of Appeals—In Ruling That the Federal Reserve Board May Approve Bank Holding Company Applications Under Section 4(c)(8) of the Bank Holding Company Act In the Absence of Substantial Evidence—Has Erroneously Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The essence of these cases lies in the failure of the respondent Board to require the bank holding company applicants to come forward with basic facts relating to their proposed nonbanking activities. *None* of the records in these cases contains *any* evidence which would support a determination that approval of the application could reasonably be expected to result in benefits to the public that outweigh possible adverse effects. Indeed, none of

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adverse effects of their engaging in [the] activity . . . ." 115 Cong. Rec. 33139 (1969).

Id. at 340 n.15 (emphasis added).

[16] As discussed more fully hereinbelow, *nothing* was apparent on the face of these applications; and, despite repeated requests by IIAA, the respondent Board undertook no meaningful efforts to unearth the well-hidden details of the applicants' proposals.

the records contains any evidence which would indicate that approval of the application would result in *any* public benefits. Incredibly, only one of the three applicants (First National State Bancorporation, Inc.) even *alleged* that its proposed nonbanking activity would benefit the public; and even it provided no evidence to support its allegation.[17]

Clearly, the Board's approval of those applications flies in the face of the ruling in *Independent Bankers Ass'n of Georgia* v. *Board of Governors of the Federal Reserve System, supra*:

> Under the "public benefits" test, the Board cannot approve the application without examining both the individual character of the holding company and the particular economic effects of its proposal.[18]

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[17] First National's "Public Benefits Statement" discussed only those "benefits" which, it alleged, would flow from approval of its application to sell credit life and credit disability insurance—an activity which is not at issue in the instant proceeding. With reference to its proposed sale of property and casualty insurance—which is at issue here—it stated only (and without any factual support) that "all the benefits of the marketing, negotiating and pricing benefits outlined previously" in connection with credit life and credit disability insurance would obtain. Those allegations of expected "benefits" were, in turn, baseless (*see* Brief of Petitioners, at 33 and nn.64-65) and entirely without factual support.

[18] 170 U.S. App. D.C. at 290, 516 F.2d at 1217. The court went on:

> In view of the essentially adjudicative nature of this determination, the presence of the "substantial evidence" test here underscores and validates our position that the Board must proceed under its Rules of Practice for Formal Hearings.

Id. The Board, of course, conducted no hearings of any sort in these cases. *See* Brief of Petitioners, at 24-26, 39-45; Reply Brief of Petitioners, at 5-8, 9-15. In the Pittsburgh National and First National cases, that fact alone should have resulted in the Court's setting aside the Board's orders. *See Independent Bankers Ass'n of Georgia* v. *Board of Governors of the Federal Reserve System, supra*, 170 U.S. App. D.C. at 285-92, 300, 516 F.2d at 1212-19, 1227.

In the instant cases, the Board not only failed to "examine" the economic effects of the applicants' proposals; it failed even to require the applicants to come forth with information on the basis of which such an examination could have been conducted! Astonishing as it may seem, the *sole* basis for the Board's approval of one of these applications (that of Pittsburgh National Corporation, in No. 79-1471) was a one-inch-by-six-inch newspaper notice which provided not the faintest clue as to how the applicant proposed to conduct its incipient insurance business.

The standard of review against which these cavalier actions must be measured is clearly set forth in Section 9 of the BHC Act:

> The findings of the Board as to the facts, *if supported by substantial evidence*, shall be conclusive.[19]

By no stretch of the imagination can the Board's "public benefits" determinations in these cases be said to have been "supported by substantial evidence." [20] The appellate court's order of April 21, 1980, did not say that they were; it said nothing.

The proper role of an appellate court in reviewing administrative decisions of the sort here in question was eloquently articulated by the late Judge Leventhal of the District of Columbia Circuit in 1970:

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[19] 12 U.S.C. § 1848 (1976) (emphasis added); *see Independent Bankers Ass'n of Georgia* v. *Board of Governors of the Federal Reserve System, supra*, 170 U.S. App. D.C. at 280, 516 F.2d at 1217, *quoted at* note 18 *supra*.

[20] Indeed, these records contain not a "scintilla" of evidence which would tend to support the Board's conclusions. *See Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938) ("Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). *See also Richardson* v. *Perales*, 402 U.S. 389, 401 (1971).

> The function of the court is to assure that the agency has given reasoned consideration to all of the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination.

Greater Boston Television Corp. v. *FCC*, 143 U.S. App. D.C. 383, 393, 444 F.2d 841, 851 (1970) (footnotes omitted).

In the instant cases, the respondent Board clearly did not "give[] reasoned consideration to all of the material facts"; to the contrary, *it did not even undertake to determine what the material facts might be.* The Board obviously did not "articulate with reasonable clarity its reasons for decision"; to the contrary, *it did not even attempt to justify or explain its approval of the subject applications.* Such irresponsible agency action must not be countenanced by this Court.

The appellate court's ruling of April 21, 1980—which, itself, failed to articulate any basis for decision—should not be permitted to stand.

For these reasons, too, a writ of certiorari should issue to review that ruling.

CONCLUSION

If the long-standing congressional policy of separating banking from other forms of commerce is to be maintained and observed, the safeguards embodied in Section 4(c)(8) of the BHC Act must be faithfully and rigorously enforced. Unless this Court undertakes to review the appellate court's affirmance of the Federal Reserve Board orders here in question, those safeguards will effectively have been written out of the law. Bank hold-

ing companies—the largest and most formidable of banking institutions—will have been issued an open invitation engage in unfettered expansion into nonbanking areas.

As submitted to the respondent Board, the applications here in question contained absolutely *no* facts upon which it could be determined that their approval would in any way benefit the public. When pressed by the petitioners herein, the applicants refused to provide any such facts. And, in abrogation of its statutory responsibility, the respondent Board declined to require the applicants to come forward with any such facts.

Untroubled by this absolute dearth of factual information, the Board approved the subject applications. In doing so, it articulated no basis for its unspoken conclusion that the applications satisfied the "public benefits" test of Section 4(c)(8).

Petitioners thereupon sought review of those orders by the court of appeals. Even on appeal, the Board did not seriously purport to have based its decisions on "substantial evidence," as required by law. Rather, it sought to justify its actions by articulating for the first time a legal standard which is clearly erroneous.

On April 21, 1980, a panel of the court of appeals affirmed the Board's actions. It did so without opinion or explanation.

Unless these matters are reheard and reconsidered, the Board and the court of appeals will have: (i) Adopted and approved a new legal standard which contravenes Section 4(c)(8), the section's legislative history, and every pronouncement by every court previously to have interpreted the section; and (ii) eliminated the universally recognized requirement that determinations by the Board in applying the "public benefits" test must be based upon "substantial evidence." Perhaps worst of all, these radical and unwarranted departures from estab-

lished law will have been effected without *any* justification or explanation whatsoever, either by the Board or by the court of appeals. The decision of which review is now sought should not be permitted to stand.

WHEREFORE, petitioners respectfully pray that a writ of certiorari issue to review the decision of the court of appeals.

Respectfully submitted,

EDWARD M. FOGARTY
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4800

Attorney for Petitioners

Of Counsel:

WILKINSON, CRAGUN & BARKER
THOMAS E. WILSON

September 5, 1980

Appendices

APPENDIX A

February 14, 1979, Order of the Federal Reserve Bank of New York

FEDERAL RESERVE BANK OF NEW YORK

New York, N.Y. 10045
Area Code 212-791-5000

February 14, 1979

Mr. Charles L. Terribile
Assistant Counsel
First National State Bancorporation
550 Broad Street
Newark, New Jersey 07102

Dear Mr. Terribile:

We refer to our letter of December 22, 1978, which continued the suspension of this Bank's authorization for First National State Bancorporation's *de novo* subsidiary, Broad & Lombardy Associates, Inc. ("BLA"), to engage in the following activity:

Acting as an insurance agent or broker for:

2) Any other insurance that is directly related to an extension of credit by a subsidiary bank or a bank related firm or is directly related to the provision of other financial services by a subsidiary bank or a bank related firm.

We also refer to your letter of January 16, 1979, responding to certain questions raised in our December 22 letter. You indicate that, under activity (2) cited above, BLA would offer to sell the following types of insurance:

(a) life and health insurance in conjunction with the [subsidiary] banks' investment planning programs;

(b) credit life and health insurance in conjunction with credit transactions which are of the non-installment type such as single pay loans; and

(c) credit related property and casualty insurance protecting real and personal property which serves as collateral for a credit transaction and, when an industry practice provides, liability coverage as part of a package on home, automobile, and business policies.

The types of insurance listed above as (b) and (c) appear to be of the kinds of insurance the Board of Governors of the Federal Reserve System (the "Board") has determined, in Section 225.4(a)(9)(ii)(a) of Regulation Y, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. With respect to type (c), you should be aware that the Board generally regards insurance protecting collateral where the security interest of a bank or bank related firm was obtained by purchase rather than by a direct extension of credit by the holding company system as not being directly related to an extension of credit by a bank related firm. However, if such security interests are purchased on a continuing basis from a firm or an individual and the interval between the creation of the security interest and its subsequent purchase is minimal, the Board may regard such purchase as an extension of credit. (*See*, Paragraph 7378 of the Board's *Published Interpretations*, 12 CFR 225.128.)

We now advise you that this Bank has no objection to First National State Bancorporation's commencing, through BLA, those types of insurance listed above as (b) and (c), at the conclusion of the 45-day period beginning October 6, 1978 and ending February 14, 1979 (which period excepts the various periods of suspension). Please let us know when the proposed activities are com-

menced, which in no event should be later than May 15, 1979, unless such period is extended for good cause by the Board or by this Bank acting pursuant to delegated authority. Upon request, such extension may be granted for good cause shown, with the provision that no extension shall be for more than 90 days at a time, and that the holding company will have commenced the proposed activities prior to the first anniversary of the expiration of the 45-day period. If the holding company has not commenced the proposed activities by the first anniversary, it will be required to file a new notice together with updated supporting documentation.

With respect to the type of insurance listed as (a) above, we find it necessary to continue the suspension, at least until such time as we have received and reviewed a more complete description of the intended activity. In any event, I understand from our conversation today that it is your intention to withdraw that portion of your application dealing with that activity.

Should you have any questions on the above matters, please feel free to contact us.

Very truly yours,

/s/ William L. Rutledge
WILLIAM L. RUTLEDGE,
Manager
Domestic Banking Applications Department

cc: Thomas E. Wilson
Wilkinson, Cragun & Barker
William B. Scher, Jr.
The National Association of
Life Underwriters
Sara Ann Kelsey
Legal Division
Board of Governors

APPENDIX B

March 13, 1979, Order of the Federal Reserve Bank of Kansas City

FEDERAL RESERVE BANK OF KANSAS CITY
FEDERAL RESERVE STATION

Kansas City, Missouri 64198

March 13, 1979

Mr. Milo L. McGonagle, President
New Mexico Bancorporation, Inc.
P.O. Box 609
Santa Fe, New Mexico 87501

Dear Mr. McGonagle:

This refers to the proposal, pursuant to section 4(c)(8) of the Bank Holding Company Act, by New Mexico Bancorporation, Inc., Santa Fe, New Mexico ("Applicant"), to act *de novo* as insurance agent for the sale of decreasing term credit life insurance, level term credit life insurance on single payment notes, credit accident and health insurance, and property and casualty insurance in connection with extensions of credit, and to act as agent for the sale of insurance coverages for Applicant's three bank subsidiaries, The First National Bank of Santa Fe, Santa Fe, New Mexico, First State Bank of Taos, Taos, New Mexico, and Fidelity National Bank, Albuquerque, New Mexico. The insurance agency activities will be conducted at offices located on premises of Applicant and its bank subsidiaries.

A protest to your application was received prior to March 1, 1979, the conclusion of the 45-day period provided in section 225.4(b) of Regulation Y. This Reserve Bank has considered the comments received and determined that the protest is not substantive. Furthermore,

it does not appear that consummation of the proposal would tend to result in an undue concentration of resources, unfair competition, conflict of interest, or unsound banking practices.

Based upon the foregoing and other considerations reflected in the record, this Bank has determined that the public interest factors the Board of Governors of the Federal Reserve System is required to consider under section 4(c)(8) outweigh possible adverse effects. This determination is subject to the Board's authority to require reports by, and make examinations of, holding companies and their subsidiaries and to require such modification or termination of activities of a holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and the Board's regulations and orders issued thereunder, or to prevent evasion thereof.

Accordingly, pursuant to authority delegated by the Board, this Bank has no objection to the commencement of the above described activities on March 14, 1979, and no later than June 14, 1979, unless such period is extended for good cause by the Board or this Reserve Bank pursuant to delegated authority. Extensions will not be approved for more than 90 days at a time nor for more than one year in total. If the holding company has not consummated the proposal by March 14, 1980, it will be required to file a new application, together with supporting documentation.

Furthermore, this approval is limited to engaging in the activities described above within the geographic areas covered in the notice of publication in the *Federal Register*. These geographic areas can not be expanded without requesting prior approval from the Board of Governors of the Federal Reserve System.

In order that our files may be complete, it will be appreciated if you would advise us as to the date the activities are commenced.

Very truly yours,

/s/ Wilbur T. Billington
WILBUR T. BILLINGTON
Senior Vice President

cc: Board of Governors of the
Federal Reserve System

John E. Danzeiser, Treasurer
New Mexico Bancorporation, Inc.

APPENDIX C

March 30, 1979, Order of the Federal Reserve Board

March 30, 1979

Thomas E. Wilson, Esquire
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Wilson:

This is in reference to your petition of March 14, 1979, pursuant to section 265.3 of the Board's Rules Regarding Delegation of Authority, requesting the Board to review the action of the Federal Reserve Bank of Kansas City, by which it determined that comments submitted by you concerning the application of New Mexico Bancorporation, Inc., Santa Fe, New Mexico ("Bancorporation"), to engage *de novo* in the sale, as agent or broker, of credit life, accident and health, and property and casualty insurance directly related to extensions of credit by Bancorporation and its three banking subsidiaries, and insurance for its bank subsidiaries, were not of a substantive nature. In your petition, you indicate that your objections to the proposal are outlined in your letters of February 21, 1979 and March 5, 1979.

In accordance with the procedures of section 265.3, your petition has been provided to the Board. After examining all of the comments you have submitted, the Board has decided not to review the action taken by the Reserve Bank and that decision is based on the following:

1. In your letters of February 21, 1979, and March 5, 1979, you assert that Applicant's notice concerning the proposal does not provide sufficient information to determine what lines of insurance Applicant intends to offer. You also assert that the notice is too general to allow a determination to be made that

public benefits resulting from the proposal will outweigh possible adverse effects. As stated in our letter of March 9, 1979, *Federal Register* notices of intention to engage in nonbanking activities are not intended to supply detailed information regarding bank holding company proposals. Moreover, as was also stated in that letter, the *Federal Register* notice indicated that copies of the application, providing detailed information on the proposal, are available for inspection at the Reserve Bank or at the Board's offices in Washington, D.C. The application provides: detailed information regarding the lines of insurance proposed to be sold; the location at which such insurance will be sold; and Bancorporation's commitment to comply with the provisions of section 106 of the Bank Holding Company Act ("Act"). Accordingly, there is substantial information in the record upon which the Reserve Bank could make a "public benefits" determination under section 4(c)(8) of the Act.

2. You also state that, as a matter of policy, the Board should not approve this application while proposed amendments to the Board's insurance regulations are outstanding. However, the proposed amendments to Regulation Y do not concern the portions of the regulation relating to property and casualty insurance, which is the subject of your comments. Consequently, your request that the Board should not act on this proposal to engage in insurance activities is not relevant to this action.

3. Your allegation that Bancorporation does not intend to offer property and casualty insurance for two to four years is based on a misreading of a statement in the application explaining the lack of projected commissions from the sale of *insurance for its bank subsidiaries.* Bancorporation stated

that its staff would not be able to develop immediately the expertise needed to administer this program effectively, and therefore, it projected zero commission income for the first three years. However, Bancorporation's statement relates only to the sale of insurance to its bank subsidiaries and does not relate to the sale of credit-related property and casualty insurance. Moreover, all activities for which the Reserve Bank granted approval must be commenced within ninety days of the date of the approval unless such time is extended for good cause shown.

4. Your concern that Bancorporation will conduct the insurance activities at impermissible locations is not warranted. The *Federal Register* notices and the application state that the activities will be conducted at the main offices of Bancorporation's bank subsidiaries in accordance with the Board's Regulation Y, 12 C.F.R. § 225.4(a)(9).

In the light of the foregoing, the Board determined on March 23, 1979, not to review the Reserve Bank's action in this matter. However, the Board is aware that there currently is pending in the Congress legislation that, if enacted, could restrict present or future insurance agency activities of bank holding companies and Bancorporation will be advised that the subject insurance agency activi-

ties may be subject to termination or divestiture in the future.

Very truly yours,

/s/ Griffith L. Garwood
GRIFFITH L. GARWOOD
Deputy Secretary of
the Board

cc: FRBANK OF KANSAS CITY
New Mexico Bancorporation

bcc: S&R Clearing Unit
KMO'DAY:slsnyder
3/29/79

APPENDIX D

April 6, 1979, Order of the Federal Reserve Bank of Cleveland

FEDERAL RESERVE BANK OF CLEVELAND

April 6, 1979

Mr. Marlyn E. Carle
Vice President and Treasurer
Pittsburgh National Corporation
P. O. Box 340777P
Pittsburgh, Pennsylvania 15230

Dear Mr. Carle:

This refers to your letter of December 18, 1978, in which you notified this Reserve Bank that Pittsburgh National Corporation intends to engage in various insurance activities listed below through its subsidiary Pinaco, Inc.:

1. Any insurance for the banking subsidiary of the holding company. Among such coverages may be property damage, extended coverage insurance on real and personal property owned or leased by the banking subsidiary; physical damage, property damage and liability insurance on motor vehicles owned or leased by the banking subsidiary; public liability coverage for the banking subsidiary and its employees; blanket bonds; safe deposit liability; and employee hospital, medical, accidental death and disability insurance.

2. Credit related insurance which will protect personal property or real property securing loans and other extensions of credit made or acquired by or personal property leased by Pittsburgh National Corporation and its subsidiaries and credit related insurance, such as liability insurance sold in connection with property damage insurance, calculated

to protect the lender's or lessee's ability to obtain payment.

3. Credit related life insurance, including mortgage redemption insurance, and credit related accident and disability insurance on the life or health of borrowers, debtors or lessees of Pittsburgh National Corporation and its subsidiaries or of borrowers, debtors or lessees of loans or other extensions of credit serviced by Pittsburgh National Corporation and its subsidiaries.

4. Insurance on mortgaged property, including homeowner's insurance, on mortgage loans made, acquired or serviced by Pittsburgh National Corporation and its subsidiaries.

As you are aware the proposed activities were protested by the Independent Insurance Agents of America, Inc. ("IIAA"). Accordingly, the 45-day processing period was suspended by this Reserve Bank while the validity of this protest was reviewed. In a letter dated April 2, 1979, the IIAA was notified by the Secretary of the Board that their objection to your proposal was not substantive in nature.

This letter is therefore to advise you that as of April 2, 1979 the 45-day processing period has been resumed and subsequently expired April 4, 1979.

Based upon the foregoing and other considerations reflected in the record, the Bank has determined that the public interest factors the Board is required to consider under Section 4(c)(8) outweigh possible adverse effects. This determination is subject to the Board's authority to require reports by, and make examinations of, holding companies and to require such modification or termination of activities of a holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and

the Board's regulations and orders issued thereunder, or to prevent evasion thereof.

Accordingly, pursuant to authority delegated by the Board, this Bank has no objection to your commencing the above described activities on April 4, 1979 and no later than July 3, 1979, unless such period is extended for good cause by the Board or this Reserve Bank pursuant to delegated authority. Upon request, such extension may be granted for good cause shown, with the provision that no extension shall be for more than 90 days at a time, and that the holding company will have commenced the proposed activity prior to the first yearly anniversary of the expiration of the forty-five day period. If the holding company has not commenced the proposed activity by the first anniversary, it will be required to file a new request, together with updated supporting documentation. Further, this approval is limited to the offering of the above services at locations covered by the original proposal.

In order that our files may be complete, it will be appreciated if you would advise us as to the date the activity is commenced.

Respectfully,

/s/ Joseph A. Sabatini
JOSEPH A. SABATINI
Associate Director
Bank Holding Company
Supervision

APPENDIX E

April 24, 1979, Order of the Federal Reserve Board

April 24, 1979

Thomas E. Wilson, Esq.
Wilkinson, Cragun and Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Wilson:

I am writing in reference to your petition of April 13, 1979, pursuant to section 265.3 of the Board's Rules Regarding Delegation of Authority (12 C.F.R. § 265.3), requesting that the Board review the April 2, 1979 action of the Federal Reserve Bank of Cleveland. The Reserve Bank had determined that comments submitted by you in a letter dated January 22, 1979, concerning the application of Pittsburgh National Corporation, Pittsburgh, Pennsylvania to engage *de novo* in certain insurance agency activities, were not of a substantive nature.

In accordance with section 265.3 of the Board's Rules Regarding Delegation of Authority, your petition has been provided to the Board and your comments have been considered. The Board believes that your January 22, 1979 letter of opposition was not timely received in accordance with section 262.3 of the Board's Rules of Procedure (12 C.F.R. § 262.3) and that, for the reasons specified in the Secretary of the Board's letter of April 2, 1979, your comments otherwise were not of a substantive nature. In addition, your request for a hearing was not timely received pursuant to section 262.3 of the Board's Rules of Procedure. Accordingly, the Board

determined on April 20, 1979, not to review the Reserve Bank's action in this matter.

Very truly yours,

/s/ Griffith L. Garwood
GRIFFITH L. GARWOOD
Deputy Secretary of
the Board

cc: FRB Cleveland
Pittsburgh National Corporation

bcc: S&R Clearing Unit

RMW:JSK:amb

APPENDIX F

April 21, 1980, Judgment of the United States Court of Appeals for the District of Columbia Circuit

NOT TO BE PUBLISHED SEE LOCAL RULE 8(f)
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-1280

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC. AND INDEPENDENT INSURANCE AGENTS OF NEW JERSEY,
Petitioners

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent

FIRST NATIONAL STATE BANCORPORATION,
Intervenor

No. 79-1398

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC. AND INDEPENDENT INSURANCE AGENTS OF NEW MEXICO,
Petitioners

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent

No. 79-1471

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC. AND PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS,

Petitioners

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondents

PETITIONS FOR REVIEW OF ORDERS OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Before: TAMM and MIKVA, Circuit Judges, and JOYCE GREEN*, United States District Judge for the District of Columbia

JUDGMENT

These causes came on to be heard on the petitions for review of orders of the Board of Governors of the Federal Reserve System and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the orders of the Board of Governors of the Federal Reserve System under review herein are hereby affirmed.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of cost out of time.

APPENDIX G

June 10, 1980, Order of the United States Court of Appeals for the District of Columbia Circuit, Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-1280

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC. AND INDEPENDENT INSURANCE AGENTS OF NEW JERSEY,
Petitioners

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent

FIRST NATIONAL STATE BANCORPORATION,
Intervenor

Before: Tamm and Mikva, Circuit Judges; and Joyce Hens Green *, Judge, United States District Court for the District of Columbia

ORDER

Upon consideration of petitioners' petition for rehearing, it is

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

ORDERED, by the Court, that petitioners' aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX H

June 10, 1980, Order of the United States Court of Appeals for the District of Columbia Circuit, Denying Suggestion for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-1280

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC. AND INDEPENDENT INSURANCE AGENTS OF NEW JERSEY,
Petitioners

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent

FIRST NATIONAL STATE BANCORPORATION,
Intervenor

Before: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, and Edwards, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by petitioners having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc*, that petitioners' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX I

Statutory Provisions

Section 4(c)(8) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843(c)(8) (1976):

(c) The prohibitions in this section shall not apply to any bank holding company which is (i) a labor, agricultural, or horticultural organization and which is exempt from taxation under section 501 of the Internal Revenue Code of 1954, or (ii) a company covered in 1970 more than 85 per centum of the voting stock of which was collectively owned on June 30, 1968, and continuously thereafter, directly or indirectly, by or for members of the same family, or their spouses, who are lineal descendants of common ancestors; and such prohibitions shall not, with respect to any other bank holding company, apply to—

* * * *

(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and

Section 9 of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1848 (1976):

> Any party aggrieved by an order of the Board under this Act may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

No. 80-356

In the Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

NEAL PETERSEN
General Counsel

RICHARD M. WHITING
Attorney

Board of Governors of the
Federal Reserve System
Washington, D.C. 20551

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-356

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether, in approving applications of three bank holding companies seeking to sell credit-related insurance, the Federal Reserve Board made the determination, required by Section 4(c)(8) of the Bank Holding Company Act of 1956, that the probable public benefits resulting from approval of these applications would outweigh the possible adverse effects.

2. Whether the Federal Reserve Board's decisions approving the applications are supported by substantial evidence.

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12 C.F.R. 225.4(a)(9) 2

12 C.F.R. 225.4(b)(1) 3

12 C.F.R. 265.2(f)(20)(i) 4

Miscellaneous:

H.R. Rep. No. 91-1747, 91st Cong., 2d Sess. (1970) 8

S. Rep. No. 91-1084, 91st Cong., 2d Sess. (1970) 8

OPINION BELOW

The decision of the court of appeals (Pet. App. 16a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1980 (Pet. App. 16a-17a). A petition for rehearing was denied on June 10, 1980 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on September 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

Section 4(c)(8) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(c)(8), provides that a bank holding company may acquire:

> shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern.

12 C.F.R. 225.4(a)(9) designates the following activities as being "closely related to banking or managing and controlling banks":

> (9) Acting as insurance agent or broker in offices at which the holding company or its subsidiaries are otherwise engaged in business (or in an office adjacent thereto) with respect to the following types of insurance:
>
> * * * * *
>
> (ii) Any insurance that (*a*) is directly related to an extension of credit by a bank or a bank-related firm of the kind described in this regulation, or (*b*) is directly related to the provision of other financial services by a bank or such a bank-related firm * * * .

STATEMENT

1. Section 4(c)(8) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(c)(8), authorizes the Federal Reserve Board to approve applications by bank holding companies seeking to engage in certain non-banking activities that are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." Prior to approving such an application, the Board must determine that the activity in question is "closely related to banking" and that performance of the proposed activity by a particular bank holding company would produce benefits to the public that reasonably may be expected to outweigh its possible adverse effects.

The Board has determined by regulation that a number of non-banking activities are "closely related to banking" within the meaning of Section 4(c)(8). One of the approved activities is the sale of credit-related insurance. See 12 C.F.R. 225.4(a)(9). The Fifth Circuit has affirmed the Board's determination that this activity is permissible for bank holding companies. See *Alabama Ass'n of Ins. Agents* v. *Board of Governors*, 533 F. 2d 224 (1976), modified on rehearing, 558 F. 2d 729 (1977), cert. denied,

435 U.S. 904 (1978). Petitioners in this case do not challenge the Board's generic determination that the sale of credit-related insurance is an activity closely related to banking. Rather, they challenge the Board's determination in three particular cases that a bank holding company's engagement in the sale of credit-related insurance can reasonably be expected to produce benefits to the public that outweigh adverse effects.

2. In 1978 and 1979, First National State Bancorporation, New Mexico Bancorporation, and Pittsburgh National Corporation, filed applications with their local Federal Reserve Banks for approval to sell certain types of credit-related insurance (C.A. App. 1-20, 137-143, 212-213).[1] Each bank holding company proposed to engage in this activity by establishing a newly organized subsidiary ("*de novo* entry"), rather than by acquiring an existing insurance company.[2] Petitioners, a national association of insurance agents and three constitutent state associations, opposed the applications. The administrative record relating to each application was thereafter supplemented by the applicants in response to petitioners' objections. Petitioners' objections were then reviewed by the appropriate Federal Reserve Bank and the Board of Governors of the Federal Reserve System. The applications of New Mexico Bancorporation and Pittsburgh National Corporation were then approved; the

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[1]"C.A. App." refers to the joint appendix filed in the court of appeals.

[2]The Board has provided simplified procedures for obtaining approval of applications to engage *de novo* in a line of business that the Board previously has determined by regulation to be closely related to banking. See 12 C.F.R. 225.4(b)(1).

application of First National State Bancorporation was approved in substantial part (Pet. App. 1a, 4a, 7a, 11a, 14a).

The court of appeals affirmed the Board's orders without opinion (Pet. App. 16a-17a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In approving each application involved in this case, the Federal Reserve Board and its local Federal Reserve Banks made the finding of public benefits required by the statute. Those findings are supported by substantial evidence.

1. Petitioners plainly err (Pet. 4-8) in contending that the Board failed to make the finding required under Section 4(c)(8) that the applicants' proposed new activities "can reasonably be expected to produce benefits to the public * * * ." With respect to each application, either the Board or the local Federal Reserve Bank acting under delegated authority (12 C.F.R. 265.2(f)(20)(i)) made the necessary public benefits finding.

First National State Bancorporation's application under Section 4(c)(8) included an extensive discussion of the public benefits that reasonably could be expected to result from its new operations (C.A. App. 17-20).[3] The applicant's discussion of public benefits was analyzed by the staff of the Federal Reserve Bank in New York (C.A. App. 59) and formed the basis for an express finding by the Federal Reserve Bank that the public benefits test was satisfied (C.A. App. 63): "Based upon the foregoing and

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[3] The Federal Reserve Bank requested additional public benefits information from the applicant before approving its application in part (see C.A. App. 106; Pet. App. 3a).

other considerations reflected in the record this [Federal Reserve] Bank has determined that the public interest factors the Board is required to consider under Section 4(c)(8) * * * outweigh possible adverse effects."

Similarly, in approving New Mexico Bancorporation's application, the Federal Reserve Bank in Kansas City expressly found that "the public interest factors the Board of Governors of the Federal Reserve System is required to consider under Section 4(c)(8) outweigh possible adverse effects" (Pet. App. 5a). The Federal Reserve Bank noted "it does not appear that consummation of the proposal would tend to result in an undue concentration of resources, unfair competition, conflict of interest, or unsound banking practices" (*ibid.*). Petitioners' objections to this decision were then reviewed by the Federal Reserve Board's legal staff (C.A. App. 207). The Board thereafter declined to review the decision of the Federal Reserve Bank and its letter to petitioners responded to each of their objections (Pet. App. 7a-9a). With respect to the public benefits issue, the Board found that "there is substantial information in the record upon which the Reserve Bank could make a 'public benefits' determination under section 4(c)(8) of the Act" (Pet. App. 8a).

Finally, with respect to Pittsburgh National Corporation's application, the Federal Reserve Bank in Cleveland expressly determined that the public benefits test was satisfied (Pet. App. 12a): "the public interest factors the Board is required to consider * * * outweigh possible adverse effects." In denying petitioners' request to review that determination, the Board advised petitioners that their opposition was not raised in a timely manner and also noted that their opposition presented no substantial issues (Pet. App. 14a). The Board's legal staff

previously had explained that petitioners failed to "contradict the Federal Reserve Bank's determination that the proposal would yield net public benefits * * * " (C.A. App. 261).

Although the Board's explanation in each case was concise, "it surely indicated the determinative reason for the final action taken * * * ." *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973). In the context of this case, the Board's explanation was sufficient. The applications in each case sought permission to engage in an activity that the Board previously had determined to be closely related to banking and a proper incident thereto. Moreover, in each case the applicants sought to engage in new activities on a *de novo* basis, without acquiring any other business firm or otherwise threatening competition. As the D.C. Circuit recently explained in *Connecticut Bankers' Ass'n* v. *Board of Governors*, No. 79-1554 (Feb. 7, 1980), slip op. 19:

> Implicit in Regulation Y is the Board's reasoned determination that the permissible activities, including * * * the sale of credit-related insurance, can generally be expected to achieve net public benefits. A specific proposal to engage in otherwise permissible conduct may provide negative results. But a protestant has some burden, albeit minimal, to show that the Board's general determination is not applicable.

The court of appeals added that this conclusion applies *a fortiori* when permission is sought to engage *de novo* in an activity that the Board previously has found to be closely related to banking. *Id.* at 19-20.

Because the Board made express findings of public benefits in this case, the decision of the court of appeals does not conflict with the decisions that petitioners cite

(Pet. 7-9).[4] And in light of those findings, this case does not raise the question whether the Board may approve an application under Section 4(c)(8) based solely on an absence of adverse effects.[5]

2. The court of appeals rejected petitioners' argument that the Board's decisions were unsupported by substantial evidence. Further review by this Court of the substantial evidence issue is unwarranted. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974).

In any event, there is no merit to petitioners' contention (Pet. 9) that the administrative records in these cases fail to show likely public benefits. To be sure, the Board

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[4]The cases cited by petitioners have little relevance here. *American Bancorporation* v. *Board of Governors*, 509 F. 2d 29, 38 (8th Cir. 1974), *Independent Bankers Ass'n* v. *Board of Governors*, 516 F. 2d 1206, 1227 (D.C. Cir. 1975), and *Florida Ass'n of Ins. Agents, Inc.* v. *Board of Governors*, 591 F. 2d 334, 340-343 (5th Cir. 1979), all dealt with the question whether the Board must consider specific objections to applications and conduct a hearing when necessary to resolve adjudicative facts. In this case, the Board analyzed petitioners' objections and found that none of them warranted denial of the present applications. *Alabama Ass'n of Ins. Agents* v. *Board of Governors*, *supra*, 533 F. 2d at 254, upheld the Board's public benefits analysis in a related context, and *Citicorp* v. *Board of Governors*, 589 F. 2d 1182, 1190-1191 (2d Cir. 1979), upheld the Board's denial of an application on public interest grounds. Neither of these cases supports petitioners' arguments here.

[5]Petitioners claim (Pet. 5 & n.7) that the Board's attorneys argued in the court of appeals that the mere absence of adverse effects is sufficient to approve an application. However, the Board's counsel clearly stated that affirmance of the Board was required because the public benefits here involved outweigh adverse effects (Resp. Br. 42-43): "In the absence of any adverse effects, and because *de novo* entry into a previously approved * * * activity reasonably can be expected to be pro-competitive and to provide additional public benefits, approval of these applications is clearly warranted under the express terms of Section 4(c)(8), and the Board properly approved each of the applications involved here on the basis that reasonably expected public benefits outweigh possible adverse effects."

advised petitioners (Pet. App. 8a) that the required finding of public benefits from the proposed *de novo* entry of New Mexico Bancorporation could be based on information regarding the lines of insurance to be sold, the location of the proposed new activities, and the holding company's commitment to comply with the legal requirements of the Bank Holding Company Act of 1956. That information provides a prima facie showing of probable public benefits in the absence of any record evidence suggesting the contrary. By offering a new insurance service in the local banking community, the applicant helps to satisfy public demand for that service. Moreover, *de novo* entry itself is an important source of public benefits, because it increases competition in the marketplace. The positive contribution made by *de novo* entry is reflected by the express terms of the statute, which permit the Board to "differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern." 12 U.S.C. 1843(c)(8). The legislative history also emphasizes the public benefits to be expected from *de novo* entry. See S. Rep. No. 91-1084, 91st Cong., 2d Sess. 15-16 (1970); H.R. Rep. No. 91-1747, 91st Cong., 2d Sess. 17-18 (1970). The courts of appeals likewise have recognized the probable public benefits resulting from *de novo* entry. See *Connecticut Bankers' Ass'n* v. *Board of Governors*, *supra*, slip op. 19-20; *Alabama Ass'n of Ins. Agents* v. *Board of Governors*, *supra*, 533 F. 2d at 249.

In short, in view of the Board's prior determination that the sale of credit-related insurance is an activity closely related to banking and is a proper incident thereto, and in view of the probable increase in competition resulting from *de novo* entry and the provision of new services to consumers, the Board did not err in finding that net public benefits could reasonably be expected from approval of the applications in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

NEAL PETERSEN
General Counsel

RICHARD M. WHITING
Attorney

Board of Governors of the
Federal Reserve System

NOVEMBER 1980

DOJ-1980-11

No. 80-356

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

EDWARD M. FOGARTY
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4800

Attorney for Petitioners

Of Counsel:

WILKINSON, CRAGUN & BARKER
THOMAS E. WILSON

November 10, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Petitioners, the Independent Insurance Agents of America, Inc. and three of its constituent state associations of independent insurance agents, hereby reply to the brief in opposition submitted by the respondent Board of Governors of the Federal Reserve System.

I.

In defense of its summary approval of the bank holding company applications here in question, the respondent Board argues only that, in each case, it made a "finding of public benefits."[1] That argument highlights once again the fact that, in each case, the Board did nothing more than *recite* its *conclusion* that the "public benefits"

[1] Brief for the Respondent in Opposition, at 4; *see id.* at 4-6.

test of Section 4(c)(8) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843(c)(8) (1976), had been satisfied.

In *none* of these cases did the respondent Board identify any of the "public benefits" which it purported to have "found," and in *none* of these cases did the Board even attempt to justify its conclusion on the basis of evidence of record. To the contrary, it made *no* factual findings and elicited *no* evidence upon which it could possibly have reached its conclusion. In the absence of any evidence of record, the Board, without explanation, merely parrotted the operative language of Section 4(c)(8).

Petitioners submit once again that the unthinking regurgitation of a statutory standard does *not* constitute a factual finding, does *not* "indicate[] the determinative reason for the final action taken," [2] and, in these cases, was *not* supported by *any*—much less, "substantial"—evidence.

II.

The respondent Board also argues once again that *de novo* entry of a bank holding company into a nonbanking field is presumptively in the public interest:

> "In the absence of any adverse effects, and because *de novo* entry into a previously approved * * * activity reasonably can be expected to be pro-competitive and to provide additional public benefits, approval of these applications is clearly warranted under the express terms of Section 4(c)(8) . . . ." [3]

It is precisely to this emasculation of the Section 4(c)(8) "public benefits" test that petitioners have attempted to draw the attention of this Court.[4]

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[2] *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

[3] Brief for the Respondent in Oposition, at 7, n.5. *See also id.* at 8 (". . . *de novo* entry itself is an important source of public benefits . . . .").

[4] *See* Petition for Writ of Certiorari, at 4-9.

There exists *no* presumption of public benefits under Section 4(c)(8), and the respondent Board's attempt to create such a presumption was unwarranted and erroneous. *See Florida Ass'n of Insurance Agents, Inc.* v. *Board of Governors of the Federal Reserve System*, 591 F.2d 334, 340 and n.15 (5th Cir. 1979); *Alabama Ass'n of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224, 235 n.6 (5th Cir. 1976), *on rehearing*, 558 F.2d 729 (1977), *cert. denied*, 435 U.S. 904 (1978).[5]

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[5] *See also Citicorp* v. *Board of Governors of the Federal Reserve System*, 589 F.2d 1182, 1190 (2d Cir. 1979); *Independent Bankers Ass'n of Georgia* v. *Board of Governors of the Federal Reserve System*, 170 U.S. App. D.C. 278, 288-89 and n.29, 516 F.2d 1206, 1215-16 and n.29 (1975); *American Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, 509 F.2d 29, 39 (8th Cir. 1974); H.R. Rep. No. 1747, 91st Cong., 2d Sess. 19 (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News 5561, 5570.

The respondent Board is attempting in these cases to achieve what it failed to achieve by regulation in 1971—the creation of a presumption of "public benefits" in *de novo* entry applications.

It was in 1971 that the respondent Board, without public notice or opportunity for comment, issued its so-called "simplified procedures" regulation. That regulation would, among other things, have created a presumption that *de novo* insurance applications satisfy both the "clearly related" and the "public benefits" requirements of Section 4(c)(8). The petitioner Independent Insurance Agents of America, Inc. petitioned the Court of Appeals for the District of Columbia Circuit for review of that regulation. *National Ass'n of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, No. 71-1744 (D.C. Cir., filed Sept. 17, 1971). *The Board thereupon withdrew the challenged regulation.* The regulation was never re-issued and—although it continues to be printed each year in the Code of Federal Regulations (12 C.F.R. § 225.4(b)(3) (1980))—it has never been relied upon by the Board in its approval of any bank holding company application.

The respondent Board's attempt improperly to achieve in these cases what it despaired of achieving in 1971 must not be countenanced by this Court.

III.

At issue in these cases is the continued vitality of the century-old congressional determination that the business of banking shall remain separated from other forms of commerce. In the arena of bank holding company activity, that policy is safeguarded and implemented by the requirements of Section 4(c)(8) of the Bank Holding Company Act.

Never before has an appellate court permitted the respondent Board to ignore those express statutory requirements and to approve a bank holding company application in the absence of an *affirmative showing* that such approval would result in *demonstrable public benefits* that *outweigh* potential adverse effects. Unless reviewed and reversed by this Court, the decision of the court of appeals in these cases to do exactly that will have rendered meaningless the carefully constructed safeguards of Section 4(c)(8).

For these reasons, and for the reasons set forth in their petition for a writ of certiorari, petitioners again pray that such a writ issue to review the decision of the court of appeals.

Respectfully submitted,

EDWARD M. FOGARTY
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4800

Attorney for Petitioners

Of Counsel:

WILKINSON, CRAGUN & BARKER
THOMAS E. WILSON

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